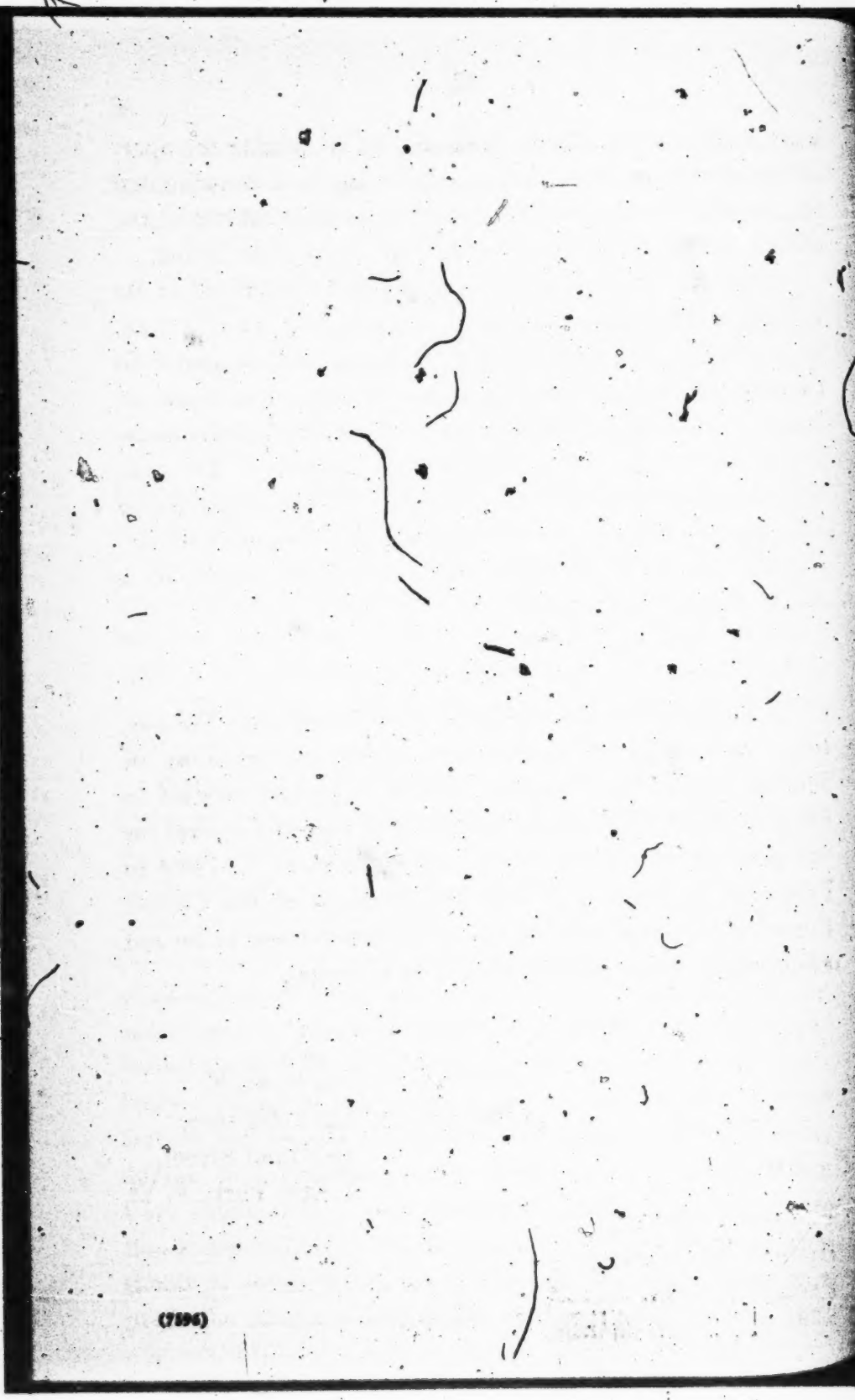

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Supreme Court of the United States

October Term, 1931.

No. 14.

HANDY & HARMAN,
Petitioner,

against

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

REPLY BRIEF FOR PETITIONER.

BREED, ABBOTT & MORGAN,
Attorneys for Petitioner,
15 Broad Street,
Borough of Manhattan,
New York City.

WILLIAM C. BREED,
HUGH S. WILLIAMSON,
PAUL L. PEYTON,
Of Counsel.

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REPLY BRIEF FOR PETITIONER.

Respondent's brief is devoted to the following propositions:

1. That the stockholders of petitioner did not own "substantially all" of the stock of Hamilton & DeLoss, Inc. (pp. 8, 9).

Petitioner agrees.

2. The statute refers to *stock* control and not to control of the business (p. 9).

Petitioner agrees.

3. Affiliation may not be allowed solely upon the ground that two or more corporations comprise a business and economic unit (pp. 17-28).

Petitioner agrees.

4. Hamilton and the majority stockholders of petitioner did not constitute "the same interests" (pp. 13-17).

Stated in these terms, petitioner also agrees, but in view of the actual control over the Hamilton 20% stock by petitioner's majority stockholders, conceded by the Court below and not disputed by respondent, it inevitably follows that substantially all of the stock of the two corporations was controlled by the same interests.

5. The control contemplated by the statute "must at least be a control legally enforcible" (pp. 10-13).

The fifth proposition brings us to the one question in this case:

Does the word "control" contained in Section 240 of the Revenue Act of 1918, mean *legally enforceable control*, or does it mean *actual control*, to be tested by the facts of each case whether or not legally enforceable?

Respondent concedes that the stockholders of petitioner owned 75.74% to 76.66% of the stock of Hamilton & DeLoss, Inc. (Br., p. 8). If the Hamilton stock (20%) was actually controlled, then "substantially all" of the stock of both Corporations was owned or controlled by "the same interests".

As to the control of the minority or Hamilton stock, the Court below pointed out that "one line of cases holds that when the corporations are operating as a business unit, actual control of the voting power of the minority stock is sufficient" and expressely stated:

> *"If this view be accepted it can scarcely be doubted that Hamilton's stock was 'controlled' by DeLoss and his associates"* (Record, p. 48).

In petitioner's main brief it is asserted that respondent concedes the existence of this actual control (Br., p. 16). This is not challenged but confirmed by respondent in his opening statement of the question presented, which reads as follows (Br., p. 2):

> "Whether two companies may file a consolidated income tax return as affiliated corporations under Section 240 of the Revenue Act of 1918 if the two companies are operating as a business unit and their stock is under the actual but not legally enforcible control of the same interests."

Admitting actual control, respondent's contention is that petitioner must fail because it was not a control based upon legally enforceable means (Br., pp. 6, 10-13). Petitioner contends that affiliation should be allowed by reason of the actual control shown by the facts of this case whether or not it was based upon legally enforceable means.

Discussion of Respondent's Citations.

In support of his various arguments, respondent cites the following District Court decisions (Br., pp. 10, 11):

Goldstein Brothers Amusement Co. *v.* White (Mass.), 33 F. (2d) 787;

Alameda Investment Co. *v.* McLaughlin (N. D. Cal.), 28 F. (2d) 81;

Montana Mercantile Co., *et al. v.* Rasmusson (Mont.), 28 F. (2d) 916.

These cases are no longer authoritative in view of later decisions of the Circuit Court of Appeals for the First and Ninth Circuits, which hold to the contrary.

the Bank rested upon his title thereto under the stock assignment from Hamilton, and we cannot see how the bank could have refused at any time to allow DeLoss to take up the shares, have them registered in his name under the irrevocable stock power, and redeposited with the bank. Certainly the circumstances of this situation are such as to give DeLoss a substantial beneficial interest in and control over the Hamilton stock.

If this Court should find that the Court below was in error in holding that DeLoss did not have the power after deposit, to cause the shares to be registered in his name, then under its own theory it would follow that substantially all of the stock of both corporations was owned or controlled by the same interests.

The Decision of the Court Below is Against the Weight of Authority.

The Second Circuit Court of Appeals is the only Circuit which has held the word "controlled" required a legally enforceable control.

Such a definition does not give effect to the usual and natural meaning of the word "controlled".

Such a definition is contrary to the interpretation placed upon the word "controlled" by the Board of Tax Appeals, in its early decisions which were followed by the Commissioner of Internal Revenue. See *Isse Koch & Co., Inc.* (1 B. T. A., p. 624); Cumulative Bulletin, IV-1, p. 2.

It is submitted that the construction of Section 240 adopted by six Circuit Courts of Appeal, which do not define control to mean only "legally enforceable" control should be

followed by this Court, and the decision of the Second Circuit, the Court below, should be reversed.

Respectfully submitted,

BREED, ABBOTT & MORGAN,
Attorneys for Petitioner,
Office & P. O. Address,
15 Broad Street,
Borough of Manhattan,
New York City.

WILLIAM C. BREED,
HUGH S. WILLIAMSON,
PAUL L. PEYTON,
Of Counsel.